Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

Robert Wagner and Margaret Wagner
Petitioners

v.

Patricia Devine, Kevin A. Jordain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of PoliceOfficers, and Local 388 of the International Brotherhood of Police Officers
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

October 1997

Stewart T. Graham, Jr.
39 Burleigh Road
Hampden, MA 01036
(413) 781-4342
Counsel of Record
for Petitioners

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QUESTION PRESENTED

Whether the exception to the First Amendment principles articulated by this Court in *Elrod v. Burns, Branti v. Finkel, and Rutan v. Republican Party of Illinois*, governing patronage practices by public employers, applies where members of a town council who politically oppose a new mayor and his administration conduct a campaign of retaliatory harassment against the mayor's appointed police chief, based solely upon the chief's political affiliation with and political support of the new mayor, preventing the chief's implementation new policies, preventing the performance of his duties as chief, and causing his constructive discharge?

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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

The Petitioners Robert Wagner and Margaret Wagner respectfully pary that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion and Judgement of the Court of Appeals for the First Circuit are not yet reported, and are set forth in Appendix A. The Memorandum of Decision and Order of the District Court of Massachusetts, Western Division, are not reported and are set forth in Appendix B.

JURISDICTION

The judgement of the Court of Appeals for the First Circuit was entered on August 1, 1997. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONSTITUTION, amendment I, provides in relevant part that "Congress shall make no law ... abridging the freedom of speech or of the press...."

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983, provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges , or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioners Robert and Margaret Wagner, brought this action pursuant to 42 USC §1983, for violation of plaintiff Robert Wagner's First Amendment rights to freedom of speech and of association. (App. A at 2). The plaintiffs' also asserted claims pursuant to state law for defamation, interference with business relations, and for Margaret Wagner's loss of consortium. *Id.* The defendants filed motions to dismiss prior to answering the complaint. (App. A at 2; App. B at 2).

Following argument on the motions on September 20, 1996, the district court ruled in favor of the defendants and dismissed the complaint in a decision dated November 6, 1996. (App. B). The court held that since Robert Wagner, appointed by the new mayor to be chief of police, was in a policymaking position, he had no First Amendment protection from retaliatory political harassment from members of the town council who were opponents of the new mayor's administration. (App. B at 6-7). The plaintiffs timely filed their notice of appeal to the Court of Appeals for the First Circuit. That court issued its decision affirming the district court on August 1, 1997. (App. A). The court of appeals held that a policymaker has no First Amendment protection from harassment by opponents of the administration which hired him. (App. B. at 10-11).

This case involves the interpretation of this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), concerning patronage employment practices, and whether the

principles articulated in those cases apply where politically motivated harassment is targeted at a policymaking officerholder by opponents of the mayor who appointed him. Both lower courts held that the above trilogy of patronage decisions stripped policymakers of First Amendment protections, and allowed campaigns of harassment designed to hinder and to prevent performance of the policymaker's duties, to be conducted against the policymaker solely on political grounds, without offending the Constitution.

The district court reasoned that since the policyholder was not protected from adverse job actions by the mayor who appointed him, he similarly had no protection from opponents of the mayor who harassed him for political reasons. (App. B at 6). The court of appeals held that the "... *Elrod-Branti* line of cases ... (excludes) policymaking public employees from constitutional protection." (App. A at 10). That court believed that the need to assure implementation of its electoral mandate by a new administration, which was one of the justifications for the excepting policymaking employees from First Amendment protection against politically based job action by their employer, is matched by the interest of political opponents to pursue objectives of their constituents. (App. A at 10).

Neither court distinguished between patronage based job actions involving politically sensitive appointees by the appointing authority, and campaigns of harassment directed toward high level appointees by opponents of their employer which interfered with and prevented such appointees' performance of their public duties. The courts rested their decisions solely on Petitioner Robert

Wagner's employment status as a policymaker.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS MISAPPLIED THE EXCEPTION FROM FIRST AMENDMENT PROTECTION CREATED FOR PATRONAGE SITUATIONS INVOLVING HIGH LEVEL PUBLIC EMPLOYEES, TO A CAMPAIGN OF HARASSMENT AGAINST A HIGH LEVEL PUBLIC OFFICIAL, BASED ON HIS POLITICAL AFFILIATION, BY OPPOSITION POLITICIANS

Through the issues presented in this petition, Petitioners seek to have this court define the parameters of First Amendment protections which high level public employees have in the performance of their duties with regard to adverse actions taken by political opponents of the administration for which the employee works, which actions are based solely on the political affiliation and beliefs of the employee. More specifically, can members of a town council who are political opponents a new mayor's administration, conduct a campaign of harassment against the mayor's appointed police chief (over whom the council has no authority to hire or fire) in retaliation for the new chief's political affiliation with and support of the mayor, and do so outside any First Amendment protections for the chief? The Petitioners contend that high level public employees retain First Amendment rights outside the patronage related employment situation involving policymakers excepted from constitutional protection by this court in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

In this case, Petitioner Robert Wagner was appointed chief of police of Holyoke, Massachusetts, by the new mayor William Hamilton. Only the mayor had the authority to hire or to fire the chief of police. Several members of the town council of Holyoke, including primarily those named as defendants herein, were political opponents of the mayor. Following the mayor's appointment of Petitioner Robert Wagner as police chief, the Defendant council members began a campaign of harassment against the new chief based solely on his affiliation with and support of the mayor. This harassment included but was not limited to attempts to eliminate the chief's salary; the reduction of his salary and benefits; constant, unfounded criticism and false accusations against him and the blocking of every program or project proposed by him; and interfering with his ability to do his job by among other things requiring him to attend council committee and subcommittee meetings without purpose except to increase the harassment of him. (App. A at 3). The harassment finally reached the point at which petitioner Wagner could not perform the duties of his office as police chief and serve the City of Holyoke, and he resigned.

The court of appeals' and the district court's opinions mis-apply the principles articulated by this Court in *ELrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In those cases, this Court defined the parameters of First Amendment protection for public employees in cases of politically motivated employment actions. This Court recognized First Amendment protections for public employees whose

positions were not politically sensitive, *i.e.*, those for which party affiliation was not an "... appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, *supra* at 518. Those officials for whom political affiliation was an appropriate consideration for appointment to a position, were excepted from First Amendment protections from job actions by their employers, based on political considerations, where the official's "... private political beliefs would interfere with the discharge of his public duties...." *Id.* at 517. However, all of the above decisions were decided in and restricted to employment decisions by the employee's employer, and had as their goal the enhancement of the "...State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* None extended the exception to political opponents of the employer, and none envisioned the use of the exception to undermine governmental efficiency and to hinder or prevent the performance of the official's public duties; both of which are allowed by the lower courts' decisions in the present case.

The present case, and those which it represents, differ from the situations for which the exception to First Amendment protection was created. Here, the actions directed against the Petitioner, while politically motivated, were not patronage actions by the Petitioner's employer. The Defendants did not have the authority to hire or to fire the police chief. The chief was appointed solely by the mayor, and accountable to him for his policy positions. The appointment by the mayor was patronage; the harassment by the defendant political opponents of the mayor in the city council were not. Thus, the present case is not analyzable in terms of

political patronage employment actions as were *Elrod v. Burns, supra*; *Branti v. Finkel, supra*; and *Rutan v. Republican Party of Illinois, supra*.. The better analysis is in terms of harassment in retaliation for one's political affiliation and beliefs.

The court in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), made the distinction between job action by an employer against a high level policymaking employee in order to further the goals of the administration for which he worked, and harassment of a high level policymaker by political opponents in order to interfere with the goals of the administration by which he was appointed. The use of political criteria by a public employer is permissible in cases of certain employees in decisions to retain the person, transfer or promote him. *Id.* at 1333. Such a "... use of politics is ... treated differently from harassment targeted on particular employees... Acts of retaliation must be distinguished from favored treatment of political supporters... It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable ... consequence of favoritism for other employees." *Id.* The court held that "(h)arassment of a public employee for his political beliefs violates the First Amendment...." *Id.*

This distinction was applied to an official who held a policymaking position by the same court in *Wallace v. Benware,* 67 F.3d 655 (7th Cir. 1995). There the court refused to apply the same presumptions which underlie political dismissals of policymakers to campaigns of retaliatory harassment. *Id.* at 662. The former set of presumptions is that such dismissals serve the public interest in efficient and effective government. The court

reasoned that "... it would be illogical to apply the same presumption to harassment designed specifically to hinder or to disrupt a ... (policymaking employee) in the performance of his duties." *Id.* The court then held that harassment of a public employee occupying a policymaking position violates the First Amendment where outright dismissal of that same employee for political reasons would not, even if the harassment has an ultimate goal of forcing the employee's resignation. *Id. at 663.*

While both W*allace v. Benware* and *Pieczynski v. Duffy*, involved harassment by the employer of an employee, *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988) presented a factual setting closer to the instant case. There, members of a town board, all Democrats, conducted a campaign of harassment against the town supervisor's confidential assistant after she ran for public office as a Republican. *Id.* at 397. The town supervisor had authority to appoint the assistant who "... served at his pleasure at a salary fixed by the town board. *Id.* The court, ruling prior to *Rutan v. Republican Party of Illinois*, *supra*, held that the *Elrod v. Burns* principles applied to job actions which stopped short of discharge. The court did not discuss the case in terms of the employment status of the plaintiff, a confidential employee and thus subject to the exception stated in *Elrod v. Burns* and *Branti v. Finkel*, but stated that, "(w)henever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns." 857 F.2d at 900.

Factually, then, *Lieberman v. Reisman*, *supra*, is

similar to the instant case. In both cases, a local legislative body conducted a campaign of harassment against an employee of the local executive. In neither case did the legislative body have the authority to hire or fire the employee, but in both cases it had the authority to fix the employee's salary. Finally, in both cases the employee was in a position for which party affiliation was an appropriate criterion. The difference in the cases is that while the town board and the town supervisor were of the same political party in *Lieberman*, the defendant members of the town council in the instant case were political opponents of the mayor for whom the petitioner worked. In *Lieberman* the Court of Appeals for the Second Circuit reversed a district court's granting of a motion to dismiss the civil rights claim, while in the present case, the First Circuit upheld dismissal. There may have been a patronage-type issue in *Lieberman*, since one count in the complaint accused the town supervisor of politically based harassment, and he may have been supportive of the town board's actions, though that latter fact is not stated in the opinion. However, no such issue is present in the petitioner's case, since the mayor who appointed him to the position of police chief, continued to support him. However, *Lieberman* is important in that the court upheld a cause of action for harassment of a confidential assistant to a public official on First Amendment grounds.

Patronage is not coterminous with political action; it is one kind of political action, *i.e.* the right to appoint to government jobs, or the control of political appointments. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, vol. II at 1656 (1966). Thus, when political officeholders harass a political appointee of an

opposition party which is in power, their actions are not patronage, and they should not protected by the principles articulated by this Court to govern patronage employment actions involving officials in positions for which political affiliation is an appropriate criterion. *Cf., Wallace v. Benware, supra; cf., Elrod v. Burns, supra; Branti v. Finkel, supra;* and *Rutan v. Republican Party of Illinois, supra.* Such actions should be evaluated in terms of the general First Amendment principles announced by this Court in *Perry v. Sindermann*, 408 U.S. 593 (1972), as interpreted and applied in *Elrod v. Burns, supra, Branti v. Finkel, supra,* and *Rutan v. Republican Party of Illinois, supra.. Cf., Wallace v. Benware, supra.; cf. Lieberman v. Reisman, supra.*

The court of appeals in its decision in this case, refused to acknowledge the distinction between harassment by political opponents, and appropriate patronage employment decisions protected by the exception crafted in the *Elrod-Branti* decisions. In this case, the lower courts applied that exception to situations which are antithetical to the purpose for which it was created, and which defeat that purpose, which was: "... to promote the public interest by enhancing the effectiveness and efficiency of a unit of local government....," *Wallace v. Benware, supra* at 663. To allow the lower courts' decisions to stand would undermine the constitutional principles announced by this Court, and grant approval to decisions which improperly apply and extend those principles. Further, to allow the lower court's decisions to remain law, would subject high level municipal officials to campaigns of harassment by political opponents who, while they cannot fire the officials, can prevent or hinder

performance of their public duties and thereby harm the public interest which such public officials seek to serve.

This is not simply a case of "... stinging partisan attacks against ... (Petitioner's) efforts..." as the court of appeals stated. (App. A at 10). Legitimate partisan attacks by legislative opponents of the mayor would be protected by absolute immunity. *Cf.*, *Forrester v. White*, 484 U.S. 219 (1988); *see, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), (extending legislative immunity to the state and regional level), and *Acevedo Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992) (extending legislative immunity to the local level). However, actions by local legislators which single out a specific individual and treat him differently from others is not legislative but administrative and is not protected by absolute immunity. *Forrester v. White, supra*, at 229; *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994) (termination of a public works superintendent allegedly for his political affiliation by a county board, was administrative and not entitled to absolute immunity). It follows then, that a politically motivated campaign of harassment carried out by opposition members of a city council against a police chief appointed by the mayor , would not be protected by legislative immunity, and would violate the chief's First Amendment rights. *Id.*, and *Wallace v. Benware, supra; see, Lieberman v. Reisman, supra*..

The jurisprudential demarcation this Court established in *Forrester v. White, supra*, between legislative actions accorded immunity and administrative actions of legislators not accorded immunity, protects

against improper judicial intrusion into legislative actions and provides guidance for the lower courts in evaluating cases such as the present case. Petitioner submits that the lower courts in this case should have analyzed the case in terms of harassment rather than patronage, and applied *Forrester v. White* to protect legitimate "partisan attacks," if any, by opposition councilors seeking to represent their constituents and to gain political power. It is the non-legislative actions by the defendants about which the Petitioners complain. It is those actions which violated Petitioner Robert Wagner's First Amendment rights and it is those actions which are not accorded immunity.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND POSSIBLY THOSE OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The actions of the Defendants consisted of a campaign of harassment designed to undermine and to prevent the performance by the Petitioner of his public duties, rather than being designed to promote and to maintain "... governmental effectiveness and efficiency." *Cf., Branti v. Finkel. supra*. The decision below permits such actions by removing First Amendment protections from Petitioner as a policymaking public employee, while the decisions of the Seventh Circuit hold that the First Amendment prohibits such actions and maintains First Amendment protections for policymaking

employees who are the targets of such harassment. *Wallace v. Benware, supra.*

This case will allow this Court to resolve the conflict in the circuits which has arisen due to the lower courts' decisions in this case. The lower courts in the present case, as noted in Part I, *supra*, held that since the Petitioner Robert Wagner was a policymaker, he had no constitutional protection pursuant to *Elrod v. Burns, supra; Branti v. Finkel, supra*; and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), from political opponents who conducted a campaign of harassment against him which interfered with and prevented his performance of his duties as chief of police. (App. A at 3 and 10). Directly contrary to those holdings is the opinion of the Court of Appeals for the Seventh Circuit in *Wallace v. Benware, supra*. That court, as discussed in Part I, *supra*, held that a campaign of harassment directed against a policymaker and which was "... designed specifically to hinder or to disrupt ... (him) in the performance of his duties," violated the First Amendment and did not come within the policymaker exception from First Amendment protection recognized by this Court in *Elrod v. Burns* and *Branti v. Finkel.*

In, *Wallace v. Benware*, *supra*, the harassment was conducted by the policymaker's superior who had the power to hire and fire. However, the Court of Appeals for the Seventh Circuit refused to apply the *Elrod-Finkel* exception for policymakers to that situation. The court reasoned that the purpose of the exception, to "... promote the public interest by enhancing the effectiveness and efficiency of a unit of local government....," was confounded by a campaign of

harassment which hinders or prevents the official from performing his public duties. 67 F.3d at 663. This was so even if the harassment was designed to bring about the official's resignation. *Id.* The court stated that

> ... our approval of retaliatory dismissals that advance the public interest does not confer upon the sheriff a right to achieve that dismissal by means that have the effect of harming the public's interest in effective government.

Thus, *Wallace v. Benware*, holds that policymakers still retain First Amendment protections, albeit limited by the *Elrod-Branti* exception for patronage employment actions which promote the employer's and the public's interests; while the lower courts in the instant case held that a policymaker loses all First Amendment protections by virtue of that status. The Petitioners assert that the decision in *Wallace v. Benware*, correctly construes and applies this Court's controlling precedents and maintains First Amendment protections for public employees in policymaking positions where the purposes of the exception from First Amendment protections does not apply. This understanding of *Elrod-Branti* would protect all employees from campaigns of harassment directed against them based on their political affiliation or belief. Harassment which interferes with the official's ability to perform the duties of his office directly contradicts the reasons for which the exception was created, and is antithetical to the public's interests. Efficiency is not promoted by such actions, and the policies approved by the electorate are not advanced. *Cf., Elrod v. Burns, supra;* and *Branti v. Finkel, supra.*

The Court of Appeals for the Second Circuit in *Lieberman v. Reisman, supra*, also appears to have removed harassment from the kinds of actions included within the protection of the exception for patronage employment actions against officials in politically sensitive positions. That court held that a claim of harassment against a confidential employee based on political affiliation and beliefs, stated a cause of action for violation of First Amendment rights. That court, however, did not discuss the exception although the employee was the confidential assistant of a Town Supervisor. Confidential employees were identified by this Court as coming within the exception to otherwise unconstitutional patronage employment actions. *Elrod v. Burns, supra; Branti v. Finkel, supra.* Assuming that the court intended to treat claims of harassment of such employees as not covered by the exception, then its decision would be in conflict with the decisions of the lower courts in Petitioner's case, and the division in the circuits would widen.

III. THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE

The question presented has direct and significant effect and importance for high level municipal as well as state employees throughout the nation. These employees are vital to the functioning of government and they must be provided legal protection against non-legislative actions by opposition political party members which harass and prevent or hinder the effective and efficient performance of the public duties these employees were appointed to perform. The federal and

all the state constitutions establish appropriate checks and balances between the branches of government. This Court has recognized those political structures and has articulated a jurisprudential body of principles to guide the lower courts in evaluating disputes which involve potential separation of powers issues.

The patronage trilogy, *Elrod, Branti and Rutan*, address one aspect of that issue, while *Forrester v. White* addresses another. The former decisions mark out the contours of First Amendment protections for public employees while allowing political decisions to prevail in appropriate, politically sensitive positions. The latter decision, demarcates the boundary between legislative actions not subject to judicial intervention, and administrative actions of legislators which if harmful are subject to judicial review. These boundary lines must be maintained and must be maintained as clearly as possible in order to promote a vigorous political system and at the same time maintain a rule of law which can identify clearly which actions by political officials breach the barrier insulating legislative actions from judicially reviewable administrative actions which impose harm on individuals which is not countenanced by a democratic system of government.

The question presented in this case will allow the Court to clarify that rule of law, and will allow the articulation of principles protective of individuals who choose to serve the public, while allowing full and unfettered political debate. Unless protections are provided for high level public employees from malicious, unfounded and purely politically motivated campaigns of harassment, fewer and fewer citizens of merit and

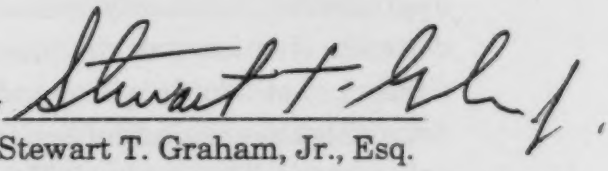
quality will choose to serve the public. Such a result will ultimately produce a system of government marked by mediocrity and mendaciousness, and the laws which were intended to protect a vigorous and effective government will instead doom it.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted
THE PETITIONERS

Date: 10/29/97

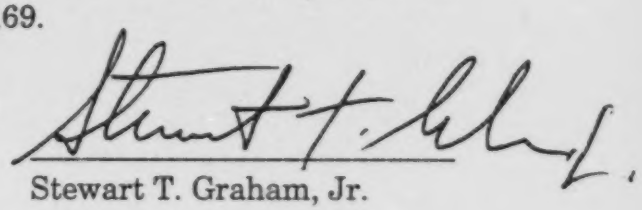
By 

Stewart T. Graham, Jr., Esq.
Counsel for Petitioners
39 Burleigh Road
Hampden, MA 01036
(413) 781-4342
BBO# 206510

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all parties, or their attorneys of record, if represented, by mailing same, postage prepaid, first class mail to John H. Fitz-Gibbon, Esq. and Harry Miles, Esq., 77 Pleasant Street, P.O. Box 210, Northampton, MA 01061; and to Lawrence Humphrey, Esq. International Brotherhood of Police Officers, 159 Burgin Parkway, Quincy, MA 02169.

Date: 10/29/97



Stewart T. Graham, Jr.

Appendix A

United States Court of Appeals
For the First Circuit

No. 96-2315

Robert Wagner and Margaret Wagner
Plaintiffs, Appellants,
v.
Patricia Devine, Kevin A. Jourdain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of Police Officers, Local 388, and the International Brotherhood of Police Officers,
Defendants, Appellees.

Appeal from the United States District Court
For the District of Massachusetts
[Hon. Frank H. Freedman, Senior U.S. District Judge]

Before
Selya, Circuit Judge,
Coffin and Cyr, Senior Circuit Judges.

Stewart T. Graham, Jr., for appellants.

John H. Fitz-Gibbon with whom Harry L. Miles was on brief of appellees Devine, Jourdain, Moran, Whelihan and the City of Holyoke, Massachusetts.

Lawrence D. Humphrey for appellees Therrien, International Brotherhood of Police Officers, Local 388, and the International Brotherhood of Police Officers.

August 1, 1997

COFFIN, Senior Circuit Judge. Appellant Robert Wagner, former chief of police in Holyoke, Massachusetts, claims that his First Amendment freedom of political association was violated when members of the city council and others subjected him to severe harassment, ultimately forcing him to resign, because of his political support for the city's mayor. He filed this lawsuit alleging federal constitutional and state law claims.[1] The district court dismissed the First Amendment counts for failure to state a claim, and declined supplemental jurisdiction over the state law counts. Because the First Amendment does not protect a policymaking official such as appellant from criticism and harassment, we affirm.

I. Factual Background [2]

Appellant Wagner was appointed Holyoke's chief of police in July 1991 by then newly elected Mayor

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[1] The complaint included a count for loss of consortium on behalf of Wagner's wife, Margaret Wagner. Because this claim survives or fails with Robert Wagner's state claims, we do not address it separately.

[2] We note that the facts alleged in Wagner's complaint provide a much sketchier picture of the defendants' alleged conduct than the facts described by counsel at the hearing on defendants' motion to dismiss. In reviewing a Rule 12(b)(6) dismissal, we typically consider the "well pleaded facts as they appear in the complaint," *see Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 51 (1st Cir. 1990) (emphasis added). Because we ultimately uphold the dismissal, and the additional facts are helpful in understanding the case we draw the facts in this section from both the complaint and the hearing. For purposes of the motion to dismiss, we take the allegations as true and grant all reasonable interferences in Wagner's favor. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)

Hamilton. Wagner asserts that four members of the City Council who were Hamilton's political opponents engaged in a campaign of harassment against him for the purpose of embarrassing the mayor and forcing appellant to resign. He contends that their criticisms of his job performance were unfair and inaccurate, and that their actions were motivated solely by their opposition to his political beliefs and his political support of the mayor.[3] He further asserts that the president of the police union, and through him the local and international unions, conspired with the council members to effectuate the plan to oust him.

The complaint accuses the council members of harassing him by means of unspecified "actions," and numerous false and defamatory statements. At the hearing on the motion to dismiss, appellant's counsel identified the challenged actions as follows:

> They were constantly criticizing him. They had subcommittees that they were chairing and they had him up to see the council constantly, criticizing him in everything he did....They tried to eliminate his salary. They reduced his salary. They reduced his benefits. They refused to fund programs that he was pushing.

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[3] In his appellate briefs, Wagner makes several passing references to a First Amendment violation based on his political speech, as well as on political affiliation, and he cites several speech cases in support of his arguments. The complaint, the hearing on the motion to dismiss, and the district court's opinion all reveal that this case has been litigated solely on the theory that defendants harassed and constructively discharged him based on his political beliefs and affiliation. Our analysis is therefore confined to that context.

Although the mayor has sole authority under the city charter to hire or fire the police chief, the council has power to set the salary and benefits for the position. According to Wagner, the four defendant council members, a minority of the governing body, "led the charge" against him and secured the complicity of enough other councilors to accomplish their unlawful objectives.

Wagner resigned in September 1994. He asserts that he was forced to do so because the defendants' actions and statements hindered, undermined, and interfered with the performance of his duties, and thus constituted a constructive discharge.[4]

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[4] Defendants contend that they cannot be found liable for a constructive discharge because only the mayor had the authority to fire Wagner. Their argument cuts too narrowly. Although the city council may not have had explicit authority to terminate the police chief, its authority to set salary, benefits and working conditions gave it the power to accomplish a constructive discharge. *See, e.g. Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 480 (1st Cir. 1993) (constructive discharge occurs when "working conditions [are] so intolerable[] that a reasonable person would feel compelled to forsake his job rather than to submit to looming indignities"); *Aviles-Martinez v. Monroiq*, 963 F.2d 2, 6(1st Cir. 1992) (similar). Of course, a minority of the council does not have such power, and a finding of constructive discharge would require some showing that the challenged conduct actually was attributable to the alleged discrimination. *See generally Scott-Harris v. City of Fall River*, Nos. 95-1950-1952, 95-2100, 1997 WL 9102, at *9-10 (1st Cir. Jan. 15, 1997), *cert. granted sub nom Bogan v. Scott-Harris*, 65 U.S.L.W. 3809 (U.S. June 10, 1997) (No. 96-1569). In any event, as we conclude *infra*, such a discharge would not be actionable if, as here, the affected employee was a policymaker.

This lawsuit followed. In addition to federal civil rights claims under 42 U.S.C § 1983, which assert violation of his First Amendment right to political association, Wagner alleged a state civil rights violation, and state law claims of defamation, tortious interference with contractual relations, and, in his wife's name, loss of consortium. In response to the defendants' motion to dismiss under FED. R. CIV. P. 12 (b) (6), the district court substantively addressed only the section 1983 count. It ruled that "the alleged harassment which Wagner sustained at the hands of a minority of the city councilors and a subordinate police officer was not of sufficient degree to constitute ' a constitutionally significant burden on [Wagner's] political association right.'" Memorandum and Order at 5 (quoting *Agosto-de-Feliciano v. Aponte-Rogue* 899 F.2d 1209, 1216 (1st Cir. 1989) (*en banc*)).

The court also concluded that, even if the harassment had been sufficiently severe to implicate constitutional concerns, Wagner's First Amendment claim still would fail because the police chief's position was one for which political affiliation is an appropriate requirement. Public employees who hold such positions, the court ruled, are not protected by the First Amendment from partisan attacks on their job performance. Having dismissed the federal claims, the court declined to exercise supplemental jurisdiction over the remaining state law causes of action and dismissed them as well.

The Wagners then filed this appeal. Our review of the district court's Rule 12(b)(6) dismissal is *de novo*. *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 n.2 (1st Cir. 1996). We may affirm a dismissal for failure to state a claim only if it clearly appears that, on the facts alleged, the plaintiff cannot recover on any viable

theory. *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). Because the district court's ruling that the First Amendment does not protect Wagner from politically motivated discrimination is both correct and dispositive, we turn to that issue first.[5]

II. Discussion

The Supreme Court more than twenty years ago established that the First Amendment provides protection for public employees from adverse job action based solely on partisan political affiliation. *See, Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion); *Branti v. Finkel,* 445 U.S. 507 (1980); *Rutan v. Republican Party*, 497 U.S. 62 (1990).[6] The protection is not universal, however. In its precedent-setting case examining the constitutionality of the patronage system, the Court recognized the competing First Amendment interest of the in-power political party "to insure that policies which the electorate has sanctioned are effectively implemented," *Elrod*, 427 U.S. at 372. The Court therefore allowed patronage practices to continue for

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5 Wagner contends that the district court's other holding, that the harassment he suffered was not constitutionally significant, was based on a misreading of the complaint. We need not, and therefore do not, take up this issue.

6 The Supreme Court addressed politically motivated discharges in *Elrod* and *Branti*, extending its reasoning to other forms of employment discrimination in *Rutan*.

those employees who, *inter alia*, make policy or occupy positions of confidence. *Id.; Branti*, 445 U.S. at 517-18.[7]

Our circuit has since faced a long line of cases raising the issue of political discrimination in employment, most of which have focused on whether the particular position held by the plaintiff employee fell inside or outside the First Amendment-protected sphere. *See, e.g., Agosto-de-Feliciano*, 889 F.2d at 1212 & n.1, 1218 (noting "first wave" of cases involving outright dismissals, and adopting standard for evaluating "second wave" cases involving discriminatory conduct falling short of discharge). This case presents an interesting departure from the norm. Both parties accept that Wagner's job as police chief sufficiently elevated him in the Holyoke hierarchy that, under the principles we have just outlined, he could be fired based on political affiliation.

Wagner, however, contends that he was subjected to an impermissible constrictive discharge because only the mayor -- the official who hired him and for whom he served as a policymaker -- may fire him based on political affiliation without violating the First Amendment. This is so, he maintains, because the *Elrod-Branti* exception was designed to ensure that the policies of a new administration -- "policies presumably

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[7] At various points in this opinion, we use the term "policymaker" as a shorthand reference for the several categories of employees for whom partisan affiliation is an appropriate job criterion. Such employees are " 'involved in policymaking, the communication of political ideas, or sensitive tasks connected with the policymaking function,' *Vazquez Rios v. Hernadez Colon*, 819 F.2d 319, 322 (1st Cir. 1987), [] or 'occupy [] positions of . . . unusually intimate propinquity to government leaders,' *id.* at 324." *Correa-Martinez*, 903 F2d at 56 n.6.

sanctioned by the electorate," *Elrod*, 427 U.S. at 367 -- would not be undercut by the obstructive tactics of opposition incumbents.. This rationale provides no justification for *opponents* of a new administration -- such as the defendants here -- to harass the administration's supporters. Their conduct, Wagner argues, is therefore unconstitutional.

Wagner's analysis ignores the reality of precedent. Both Supreme Court and First Circuit caselaw have recognized the applicability of the *Elrod-Branti* dichotomy outside the context of a new administration's patronage practices. The conflict in *Rutan*, where the Supreme Court held that the first Amendment forbids government officials from basing less-than-discharge actions such as hiring, promotion and transfer on political affiliation and support, did not arise amidst the seating of new administration. At issue was the implementation of an executive order proclaiming a hiring freeze, with "exceptions" allegedly made based on political affiliation. In referring back to *Elrod* and *Branti* in the opinion's opening, paragraph, the majority broadly described those cases as protecting public employees from discharge "solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved," 497 U.S. at 64. That decision indicates that the First Amendment protection against patronage practices, as well as the exceptions for certain categories of highly placed employees, apply whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors.

Our decision in *Romero-Barcelo*, 75 F.3d at 33-34, brings us even closer to the present context. In rejecting

a former Puerto Rico governor's allegations that he had suffered severe political discrimination during a murder investigation because of his association with the out-of-power New Progressive Party (NPP), we stated:

> The Supreme Court has held that the First Amendment "protects nonpolicymakers from being drummed out of public service on the basis of their political affiliation or advocacy of ideas." ... But Romero-Barcelo most assuredly qualified as an NPP policymaker... Thus, the district court correctly found no First Amendment protection for "a politician whose rights to freedom of speech, freedom os association, and freedom ' to disassociate [oneself] from unpopular views' have been injured by other politicians seeking to undermine his credibility within his own party and with the electorate."

75 F.3d at 34 (Citations omitted). *Cf. Larou v. Ridlon*, 98 F.3d 659, 661 (1st Cir. 1996) (noting as a general principle that "[t]he First Amendment protects nonpolicymaking public employees from discrimination based on their political belief or affiliation"); *Correa-Martinez*, 903 F.2d at 56-57 & n.6 (same).

Our conclusion in *Romero-Barcelo* stemmed from a recognition that an administration's need to assure that it can implement the people's will is matched by the equally legitimate right of political opponents to exert pressure on behalf of their veiwpoints and constituents. Indeed, like the mayor, the minority members of the Holyoke City Council represented a portion of the electorate, and they therefore share the rationale that they were pursuing objectives sanctioned by the voters

who supported them. The democratic process envisions a give-and-take in matters of policy, and the unfortunate fact that some individuals will be caught in the crossfire is "an all too real by-product of our long-standing organization of political life into two or more parties," *Agosto-de-Feliciano*, 889 F.2d at 1217.

The *Elrod-Branti* line of cases struck a balance between the competing First Amendment interests by excluding policymaking public employees from constitutional protection. *See, e.g., id.* at 1215 (quoting *Elrod* to the effect that "there are First Amendment interests on both sides"); *Pieczynski v. Duffy*, 875 F.2d 1331, 1334 (7th Cir. 1989) (noting "the balance"). Policymakers, as front-line representatives of the policies they were hired to implement, can be expected to face stinging partisan attacks against their efforts by outsiders seeking to persuade the electorate (and fellow legislators) to make them the insiders. Wagner was in a particularly vulnerable position because of the division of power over his job between the mayor and city council, both of whom possessed municipal authority -- albeit in different ways -- to terminate his employment. At least when the political pressure exerted by those in power is within their authority,[8] the First Amendment down not provide a shield for those whose positions are politically sensitive.

We add this comment about appellant's particular circumstances. Were appellant's argument to be

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8 There is no allegation, for example, that the city council lacked authority to reduce, or even eliminate, the police chief's salary, or that improper procedures were followed.

accepted --*i.e.*, that harassment and criticism by political opponents rising to the level of a constructive discharge constituted a First Amendment violation -- we quail at the prospect of judges and juries being inundated by claims of unhappy politicians that their opponents had transgressed the boundary between constitutional and unconstitutional fair play. Partisan politics does not, we fear, lend itself to the rulemaking authority of a Marquess of Queensberry.

We therefore conclude that, because there is no dispute that appellant Wagner's position as police chief was a policymaking one, the district court properly held that he had no First Amendment right to be free from discriminatory treatment based on his politics. This conclusion makes it unnecessary to consider the other issues surrounding his First Amendment claims, including the adequacy of his allegations, the scope of legislative immunity, and whether the allegedly improper motives of a four-member minority of a fifteen-member city council provide a basis for municipal liability. In these circumstances, dismissal of the state law claims also is appropriate. *See McIntosh v. Antonino*, 71 F.3d 29, 33 n.3 (1st Cir. 1995).

The judgment of the district court is affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Robert Wagner and	)	
Margaret Wagner	)	
Plaintiffs	)	
	)	
v.	)	**CIVIL ACTION**
	)	**No. 95-30257-FHF**
Patricia Devine, et al	)	
Defendants	)	

MEMORANDUM AND ORDER

November 8, 1996

FREEDMAN, S.J.

I. INTRODUCTION

Robert Wagner ("Wagner") complains that during his tenure as Chief of Police for the City of Holyoke, Massachusetts, political opponents of then-Mayor William Hamilton conspired to harass and publicly humiliate Wagner. Wagner asserts that the public criticism he sustained prevented him from effectively performing his job and forced him to resign as Chief of Police. Alleging federal and state civil rights violations, defamation, and tortious interference with contractual relations, Wagner has sued Holyoke, four Holyoke city councilors, the Holyoke police union and the president of the Holyoke police union, seeking compensatory damages, costs, and attorney's fees. Wagner's wife, Margaret Wagner, has sued for loss of consortium.

Holyoke and the Holyoke city councilors, as well as the police union and the union's president, have moved to dismiss the Wagners' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Wagners oppose the motions.

II. STANDARD OF REVIEW

A complaint serves the narrow purpose of providing a defendant with adequate notice of a plaintiff's claims and the grounds upon which they rest. *See Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990); *see also* FED.R. CIV. P. 8(a) (2). When assessing the legal sufficiency of a complaint, the issue before a court is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *V.S.H. Realty, Inc. v. Texaco Inc.*, 757 F.2d 411, 414 (1st Cir. 1985) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Therefore, in reviewing a Rule 12(b) (6) motion, a court must construe the plaintiff's complaint liberally, accepting the factual averments contained in the complaint as true, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with law, the court must deny a defendant's motion to dismiss. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994); *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992); *Torres Ramirez*, 898 F.2d at 226.

III. FACTS

The Court will recite the facts in the light most favorable to the Wagners. *See Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). On July 8,

1991, Mayor Hamilton appointed Wagner as Holyoke's Chief of Police. At the time of Wagner's appointment, Patricia Devine, Kevin Jourdain, Charles Moran and John Whelihan were members of the Holyoke City Council; all were political opponents of Mayor Hamilton. The Holyoke City Council is powerless to appoint or discharge the Chief of Police.

During meetings of the City Council, Devine, Jourdain, Moran, and Whelihan made unspecified statements criticizing Wagner and Wagner's performance as Chief of Police. Arthur Therrien, a Holyoke police officer and President of the International Brotherhood of Police Officers, Local 388, supplied Devine, Jourdain, Moran, and Whelihan with unspecified information critical of Wagner. Wagner states that the criticism of him during City Council meetings as bogus and was motivated by Wagner's political affiliation with Mayor Hamilton. The statements undermined Wagner's ability to perform his duties, and were ultimately intended to force Wagner's resignation and to embarrass Mayor Hamilton.

In addition to their comments in City Council meetings, Whelihan and Jourdain also made statements regarding Wagner which were reported in newspapers throughout western Massachusetts. Whelihan stated that he did not feel comfortable at City Council meetings with Wagner sitting behind him armed with a gun. In another context, Whelihan was quoted as saying that "Wagner's elevator is stuck between two floors," and that Wagner "did not know what he was talking about." Also, at some point, Jourdain denied an assertion by Wagner that Jourdain had requested a gun permit for personal protection. According to Wagner, each of these

statements is defamatory.

On unspecified occasions, Therrien also commented to the press respecting Wagner's performance. Therrien accused Wagner of misappropriating police funds and abusing overtime pay. Therrien also complaint of mismanagement and an overall lack of direction within the police department. Therrien hypothesized that Wagner was forced to resign by Mayor Hamilton. Wagner claims that Therrien's statements were defamatory and made with the intent of forcing Wagner's resignation.

Eventually, Wagner resigned his position as Chief of Police in Holyoke. This lawsuit followed.

IV. DISCUSSION

Counts I and III of the Amended Complaint seek relief under 42 U.S.C. §1983, alleging that Wagner's forced resignation violated his First Amendment right to political association. Count II seeks recovery for the violation of Wagner's state civil rights. Counts IV, V, and VI sound in defamation. Count VII alleges tortious interference with contractual relations. In Count VIII, Mrs. Wagner seeks loss of consortium damages.

A. Section 1983 Claims

The success of Wagner's section 1983 action depends upon the viability of his First Amendment claim. Wagner's First Amendment claim is grounded on the public comments made by Devine, Jourdain, Moran, Whelihan, and Therrien respecting Wagner's performance as Chief of Police. Wagner argues that the politically-motivated harassment he sustained left him

with no choice other than to resign his position. As a consequence of his unlawful constructive discharge. Wagner contends that he was denied the right to associate with Mayor Hamilton and the right to hold his own political beliefs.

Under First Circuit precedent, a public employee states a claim for violation of his right to political association "when the government's actions are sufficiently severe to cause reasonable hardy individuals to compromise their political beliefs and associations in favor of the prevailing party." *Agosto-de-Feliciano v. Aponte-Rogue* 889 F.2d 1209, 1217 (1st Cir. 1989). In the Court's view the "slurs and gibes" Wagner outlines in his Amended Complaint merely comprise "an all too real by-product of our long-standing organization of political life into two or more parties." *See id.* By accepting the position as Holyoke's Chief of Police and joining Mayor Hamilton's administration, Wagner reasonable could be required "to develop a suitable thick skin to withstand the rigors of our societal, often highly politicized, life." *See id.* Overall, the Court concludes that the alleged harassment which Wagner sustained at the hands of a minority of city councilors and a subordinate police officer was not of sufficient degree to constitute "a constitutionally significant burden on [Wagner's] political association right." *See id* at 1216. As a result, Wagner's section 1983 action will prove unsuccessful, and Counts I and III of the Amended Complaint will be dismissed.

Even assuming, *arguendo*, that the public criticism of Wagner was so severe that a reasonable person in Wagner's position would have compromised his political beliefs and resigned in the face of such scrutiny,

Wagner's First Amendment claim would still fail. While it is true that a line of federal cases beginning with *Elrod v. Burns*, 427 U.S. 347 (1976), recognizes that the First Amendment protects a public employee from adverse government action based upon the employee's political beliefs, *see, e.g. Rutan v. Republican* Party, 497 U.S. 62 (1990); *Agosto-de-Feleciano v. Aponte-Rogue*, 889 F.2d 1209 (1st Cir. 1989); *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), *Elrod* and its progeny do not extend First Amendment protection to a public employee who holds a position where "' party affiliation is an appropriate requirement'" for the job. *See Figueroa-Rodriguez v. Lopez-Rivera*, 878 F.2d 1478, 1480 (1st Cir. 1989) (quoting *Branti v. Finkel*, 445 U.S. 507 (1980)); *see also Benoit v. Weld*, 804 F. Supp. 393, 399 (D. Mass.), *aff'd*, 977 F.2d 566 (1st Cir. 1992).

In Holyoke, the Chief of Police is appointed by the Mayor. Thus, like-mindedness with the Mayor on matters of law enforcement policy is an obvious and appropriate requirement for the position. Under *Elrod* and its progeny, if a divergence of views ever arose between Mayor Hamilton and Wagner, then Mayor Hamilton could have discharged Wagner for political reasons with impunity. Given that the first Amendment allowed Wagner to be open to politically-based assaults from his own boss, the Court discerns no reason why Wagner was not also open to politically-based harassment and criticism from other government agents.[1] In the end, the Court finds that Wagner, not

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[1] Wagner's reliance on *Miller v. Hull*, 878 F.2d 523 (1st Cir. 1989), is misplaced.

ujnlike other high-ranking policymakers in Holyoke, was not protected by the First Amendment from partisan attacks on his job performance.

B. State Law Claims

Count II and Counts IV-VIII of the Amended Complaint are before the Court by virtue of supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). In the event, however, that a district court has dismissed all claims over which it possessed original jurisdiction, the district court may decline to exercise supplemental jurisdiction over the remaining claims. *See* 28 U.S.C. 1367(c) (3). Having dismissed the Wagners' federal law claims, the Court declines to retain jurisdiction over their remaining state law claims. Accordingly, Counts II and Counts IV-VIII are dismissed for lack of subject matter jurisdiction. *See Benoit,* 804 F.Supp. at 399; *see also Rodriquez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1175-76 (1st Cir. 1995) (explaining origin and parameters of supplemental jurisdiction).

V. CONCLUSION

For the above-stated reasons, defendants' motions to dismiss are GRANTED.

It is So Ordered.

Frank H. Freedman
Senior United States District Judge

(2)

No. 97-754

Supreme Court, U.S.
F I L E D
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In The
Supreme Court of the United States
October Term, 1997.

Robert Wagner and Margaret Wagner,
Petitioners,
v.
Patricia Devine, Kevin A. Jordain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of Police Officers, and Local 388 of the International Brotherhood of Police Officers,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For
The First Circuit

Brief of Arthur Therrien, the International Brotherhood Of Police Officers, and Local 388 Of the International Brotherhood Of Police Officers In Opposition

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Lawrence D. Humphrey
International Brotherhood of
Police Officers
159 Burgin Parkway
Quincy, MA 02169
(617) 376-0220

2088

Question Presented

1. Whether the Chief of Police who is a policymaker is entitled to First Amendment protection from constructive discharge by a minority of city council members and a private individual who petitioned the city council for redress of grievances because of the Chief's close association with the Mayor with whom the minority of city council members have political differences.

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Brief of Arthur Therrien, the International Brotherhood Of Police Officers, and Local 388 Of the International Brotherhood Of Police Officers In Opposition

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Pursuant to Supreme Court Rule 15, the Respondents Arthur Therrien, the International Brotherhood of Police Officers, and Local 388 of the International Brotherhood of Police Officers (collectively, "Therrien") submit this brief in opposition to the petition for writ of certiorari ("Pet.").

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1 through 11 of Appendix A to the petition ("Pet. App. A"), is reported at 122 F. 3d 53 (1997). The earlier decision of the United States District Court for the District of Massachusetts is unreported, and it is included in Appendix B to the Petition at pages 1 through 7.

Jurisdiction

The opinion of the First Circuit Court of Appeals was entered August 1, 1997. See Pet. App. A-1. The petition was filed October 30, 1997, and was received by Therrien on November 3, 1997. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

Relevant Constitutional and Statutory Provisions

The recitation of pertinent constitutional and statutory provisions set forth at pages 2-3 of the petition is accurate, and Therrien accepts it with one addition. The United States Constitution, amendment I, provides more fully in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

Statement of the Case

This action was brought by the petitioners, Robert Wagner, former Chief of Police for the City of Holyoke, and his wife Margaret Wagner, in the United States District Court for the District of Massachusetts, Western Division, on December 8, 1995, seeking recovery for alleged wrongful acts relating to his resignation from employment.

The respondents-defendants are the City of Holyoke and four city councilors. Arthur Therrien, a City of Holyoke police officer and president of the International Brotherhood of Police Officers (IBPO), Local 388; IBPO, Local 388, and the IBPO were also named as defendants.

On July 8, 1991, petitioner was appointed to the position of Chief of Police of the City of Holyoke by the Mayor. Pet. App. B-2-3. When petitioner was appointed, respondents Patricia Devine, Kevin Jourdain, Charles Moran, and John Whelihan were elected members of the Holyoke city council, and political adversaries of the Mayor. Pet. App. B-3. These four members comprised a minority of the city council. Pet. App. A-4. The Mayor had the authority to appoint or discharge the Chief of Police, but the city council likewise possessed the authority to terminate him, although in a different fashion, by controlling the salary and benefits for the position. Pet. App. A-4, 10.

The four city councilors allegedly harassed and attempted to interfere with petitioner's job performance. Pet. App. A-3-4. Petitioner claims that the city councilors criticized the manner in which he operated the police department, tried to eliminate his salary, reduced his benefits, and refused to fund programs he advocated. Id. He maintains that their actions were motivated solely by their opposition to his political beliefs and his political support of the Mayor. Id. Arthur Therrien, and through him the respondent unions, purportedly acted together with the other respondents to force the petitioner to resign by petitioning the city council about petitioner's operation of the police department and other public

concerns. Id.; Pet. App. B-4. As a result of the actions of all the respondents, petitioner eventually resigned his position as Chief of Police.

The respondents moved to dismiss this action, and after a hearing on September 20, 1996, the district court dismissed petitioner's complaint, because he would not be able to sustain his federal claim under 42 U.S.C. §1983. Pet. App. B-3. The court reasoned that the respondents' statements were an outcome of our two-party political system, and that in his position as Chief of Police, the petitioner is expected to develop a "'suitably thick skin'" to withstand the heated rough and tumble of our political life. Pet. App. B-5. The court concluded that the alleged harassment of petitioner by a minority of the city councilors and a subordinate police officer did not amount to "'a constitutionally significant burden on [Wagner's] political association right.'" Id. The court further concluded that petitioner like other high ranking municipal policymakers "was not protected by the First Amendment from partisan attacks on his job performance." Pet. App. B-6-7.

Petitioner then filed an appeal. On August 1, 1997, the First Circuit Court of Appeals affirmed the judgment of the district court. Pet. App. A-11. The First Circuit concluded that the First Amendment protection against patronage practices and its exceptions for certain higher echelon employees applied "whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors." Pet. App. A-8. The court recognized the First Amendment interests on all sides and noted that a balance between these competing interests had been struck by the Supreme Court by excluding policymakers[1] from constitutional protection. The court held that since petitioner was a policymaker he had no First Amendment right to be free from discriminatory treatment based on his political association. Pet. App. A-11.

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[1] The First Circuit used the term "policymaker" as a convenient short-hand reference for the various categories of employees for whom political affiliation is an appropriate job criterion. Pet. App. A-7 n. 7. The term is used throughout this brief in the same way.

Reasons For Denying The Writ

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10. Such a writ is to be granted "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary review, and it should be denied.

I. THE FIRST CIRCUIT'S HOLDING THAT THE FIRST AMENDMENT DOES NOT PREVENT THE CONSTRUCTIVE DISCHARGE OF A POLICYMAKER BECAUSE OF HIS POLITICAL AFFILIATION DOES NOT WARRANT REVIEW.

Petitioner claims the Supreme Court's patronage trinity: Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980); and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), is confined to patronage practices by an employer, not to adverse treatment by the employer's political adversaries (Pet. 9-10), and to patronage-related employment actions, not to politically-motivated employment actions. Pet. 12-15. Accordingly, petitioner alleges he is entitled to First Amendment protection, even though he acknowledges he is a policymaker (Pet. App. A-7), because he was singled out for harassment and ultimately constructively discharged by the Mayor's political opponents because of his political association with the Mayor, his employer, and his discharge was not a patronage-related employment action. Pet. 7-15. However, the decision below was a plainly correct application of settled law, and no conflict among the circuits exists.

As a general proposition, the dismissal of a public employee for purpose of political patronage violates the employee's First Amendment rights. Elrod v. Burns, 427 U.S. 347, 360 (1976). However, protection of First Amendment rights is not absolute. Id. The Court recognized that the need for government efficiency and

effective implementation of voter-sanctioned policies was a vital government interest, and therefore the First Amendment would not be offended as long as patronage dismissals were restricted to policymaking decisions. Id. at 372.

The Court reaffirmed Elrod but refined the test for determining when political affiliation would be an appropriate requirement for employment purposes in Branti v. Finkel, 445 U.S. 507 (1980). The proper test is not whether the label "policymaker" or "confidential" is attached to a particular position; instead a court should examine whether or not the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved. Id. at 518.

In Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the Supreme Court held that party affiliation was not a permissible motivating factor in patronage practices less than discharge involving lower echelon employees. However, the Court affirmed the Elrod-Branti exception for certain high level employees. Id. at 74.

In this matter, the First Circuit recognized that the Elrod-Branti principles are applicable outside the context of a new administration's patronage practices. Pet. App. A-8. The court relied upon Rutan which involved politically-motivated employment actions in the context of the implementation of a hiring freeze for state agencies, although exceptions were made allegedly on the basis of political affiliation. Further, the court noted that Rutan described Elrod and Branti as protecting public employees from dismissal " 'solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved,' 497 U.S. at 64." Pet App. A-8. The court rightly concluded based on Rutan that First Amendment protection against adverse employment treatment for lower echelon employees and the Elrod-Branti exception for certain high-level positions apply "whenever public employees are at odds politically with their superiors and thus subject to politically discriminating behaviors." Pet. App. A-8.

The First Circuit's conclusion that the Elrod-Branti principles apply to politically-motivated actions is reinforced by other lower court decisions. In Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23 (1st Cir. 1996), for example, the court applied the Elrod-Branti principles not only to politically-motivated actions but to actions by a policymaker's political adversaries as well. There, a former governor claimed that his right to associate with his out-of-power political party was violated by alleged defamatory statements made by his political adversaries during legislative hearings into possible murder. More specifically, the former governor claimed, like petitioner here, that he was singled out for harassment and deprivation of his rights because of his beliefs and political association. The court identified the former governor as a policymaker in his party and held he had no First Amendment protection from the actions of "other politicians seeking to undermine his credibility within his own party and with the electorate." 75 F.3d at 34.

Kaluczky v. City of White Plains, 57 F. 3d 202 (2d Cir. 1995), is to the same effect. The Second Circuit held that a policymaker, even one with a statutory six-year term in office, enjoyed no constitutional protection from adverse treatment by political adversaries. 57 F. 3d at 204-205. Similarly, in Affrunti v. Zwirn, 892 F. Supp. 451 (E.D. N.Y. 1995) aff'd, 100 F. 3d 943 (2d Cir. 1986), current and former members of the town board of zoning appeals alleged that the Town Board and Town Supervisor conspired to reduce their salaries and benefits so drastically because of their political affiliation that their resignations would constitute constructive discharge. The court explained that plaintiffs were policymakers and, therefore, were not protected by the First Amendment against adverse treatment because of their political affiliation. 892 F. Supp. at 459. The First Amendment did not prevent the defendants from reducing the plaintiffs' salaries, even to the point of constructive discharge. Id.

In short, the First Circuit correctly concluded on the basis of well settled law that as a policymaker, the petitioner could be discharged or constructively discharged on the basis of his political association with the Mayor by the city council. Pet. App. A-10.

"The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge." 497 U.S. at 75.

The First Circuit's conclusion is reinforced by its recognition of the First Amendment rights of the respondents which the petitioner continues to ignore. Pet. App. A-9-11. To accept petitioner's claim that, even though he is a policymaker, he is insulated from partisan actions by elected members of the city council would deny them their First Amendment freedom of expression and associational rights.

A major purpose of the First Amendment is the protection of freedom of expression upon public questions. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). This expression includes discussions of public officials, government policies, structures and forms of government, the manner in which government is operated, public issues, and other matters relating to the political process. Public debate on these issues "should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. Public officials are expected "to develop a suitably thick skin to withstand the rigors of our societal, often highly politicized life." Agosto-De-Feliciano v. Aponte-Rogue, 889 F.2d 1209, 1217 (1st Cir. 1989).

To accept petitioner's claim that even though he is a policymaker, he is insulated by the First Amendment from partisan actions by the elected members of the city council would deny them their First Amendment freedom of expression and associational rights. Petitioner seeks to muzzle the elected members of the city council by suppressing their right to criticize public appointees and to advocate for or against change by elevating his First Amendment rights over theirs. "Modern American politics involves organized political parties." United Public Workers of America v. Mitchell, 330 U.S. 75, 100 (1947). Elected officials of one party are not required to sit silently while an appointed official of another party promulgates government policies, operates his office in a manner, or expounds on public issues to which they are opposed. Such a constitutional requirement would undercut representative

government and would defeat the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process . . . ." Williams v. Rhodes, 393 U.S. 23, 32 (1968).

Second, the right to associate with others of one's choice for the common advancement of political beliefs is an integral part of the First Amendment. Elrod v. Burns, 427 U.S. at 257. Restrictions on elected officials' ability to do their job violates their right to associate with the constituents and the constituents' rights to be represented. Peeper v. Callaway County Ambulance District, 122 F. 3d 619, 623 (8th Cir. 1997). Elected officials are charged with carrying forth the mandate of the electorate, and in order to effectuate the policies promised the voters, they must be free to discuss public affairs and implement policy. See Gonzalez v. Benavides, 712 F. 2d 142, 148 (5th Cir. 1983). They are obligated to take positions on controversial political issues so that their constituents can be fully informed by them, be better able to assess their qualifications for office, and be represented in public debate by the person they have elected to represent them. Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir.) cert. denied, 493 U.S. 976 (1989). Petitioner's limitation on the city council members would deny them the authority to do their job and deprive voters an opportunity to be heard in public debate.

The city council and the Mayor here check and balance one another. If both branches were composed entirely of members of the same political party, harmony would reign. During times like now in which the city council contains some members of the opposing party, conflict is inevitable. As the First Circuit realized, the appropriate method of settlement is through the give and take of the two branches. Pet. App. A-10. Cf. Baker v. Carr, 369 U.S. 186, 217 (1962).

Moreover, individual citizens and private organizations, like the respondents here, should not be punished for their expressions on public affairs, government officials, and matters of public interest. Their right to petition the government in an attempt to influence it or its officials is entitled to the same constitutional protection as

petitioner's claimed First Amendment right. Stern v. United States Gypsum, Inc., 547 F. 2d 1329, 1342 (7th Cir.), cert. denied, 434 U.S. 975 (1977). Criticism of governmental policy and of government officials is at the very heart of First Amendment guarantees. Id. at 1342. The respondents' actions constitute direct involvement in governance, and allowance of this lawsuit would have a dangerous chilling effect on a citizen's willingness to express his views to government officials or to lobby them to take action. Gibson v. City of Alexandria, 855 F. Supp. 133, 136 (E.D. Va. 1994).

In sum, the decision below rests on long established principles of First Amendment law. The application of these principles to this case presents no questions warranting review by this Court.

II. REVIEW IS NOT WARRANTED BECAUSE NO CONFLICT EXISTS AMONG THE LOWER COURTS.

Petitioner claims the existence of a conflict between the First Circuit and Seventh Circuit, and possibly the Second Circuit. Pet. 15-18. However, a conflict in the lower courts will not justify review unless it is "real and embarrassing." Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne F. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). The purported conflicts are neither real nor embarrassing.

Petitioner first claims that the decision below is contrary to Wallace v. Benware, 67 F. 3d 655 (7th Cir. 1997). In that case a sheriff's deputy brought an action against the county sheriff, claiming that the sheriff violated his First Amendment rights by retaliating against him through harassment after the deputy announced that he would run against the sheriff in an upcoming election. 67 F. 3d at 656. The court held that a campaign of retaliatory harassment violated the deputy 's First Amendment rights even though outright dismissal would not have. Id. at 662.

The Seventh Circuit and the First Circuit, however, are not in conflict. First, the deputy sheriff in Wallace claimed the harassment

was prompted solely by political speech during his campaign, 67 F. 3d at 656-657, unlike the petitioner whose claim is based solely on his political association with the Mayor. Pet. App. A-3 n.3. Wallace did not involve politically-motivated actions directed at the deputy because of his political association with the sheriff by the sheriff's elected political adversaries. Consequently, the competing First Amendment rights that exist in this case do not exist in Wallace.

Second, unlike the deputy in Wallace, the petitioner asserts he was discharged, although constructively. Nevertheless, form is discarded for substance, and a constructive discharge is treated as tantamount to an outright dismissal. See Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993). Since an outright dismissal would not have violated the deputy's First Amendment rights in Wallace, petitioner's dismissal here does not violate his rights.

Third, in Agosto-De-Feliciano v. Aponte-Rogue, 889 F.2d 1209 (1989), the First Circuit already recognized that public employer action short of dismissal, such as subjecting an employee to less advantageous conditions and responsibilities in the nature of harassment, adversely affecting a nonpolicymaking employee, based solely on the employee's political affiliation, violates the First Amendment right of free association. Petitioner's reliance on Wallace, therefore, to show a conflict among the lower courts is meritless.

No conflict exists between the First Circuit and Second Circuit either. Petitioner refers to Liebermann v. Reisman, 857 F.2d 896 (2d Cir. 1988), which held that unfavorable public employer action short of dismissal based on an employee's political affiliation could support a federal civil rights action. This is a pre-Rutan case, and the First Circuit likewise recognized such an action for nonpolicymaking employees pre-Rutan. Agosto-De-Feliciano v. Aponte, 889 F.2d 1209 (1989).

A post-Rutan Second Circuit decision closer to this case is Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995). In that case the plaintiff was a Republican personnel officer who was reappointed to a six-year term in office in 1992, the last year of a

Republican administration. 57 F.3d at 204. After a Democrat administration took office in January 1994, they allegedly retaliated against plaintiff because of his political views, his party affiliation, and certain testimony he gave at a disciplinary hearing that ended in the dismissal of a Democrat. Id. Specifically, plaintiff alleged that the defendants humiliated, harassed, and isolated him politically, as well as drastically curtailed his professional responsibilities, in an effort to induce his resignation. Id. at 205. Plaintiff, however, did not resign. The court held that, because plaintiff was in a confidential policymaking position, he had no First Amendment protection from being fired or having his authority reduced as a result of his political beliefs and party affiliation. Id. at 207-209.

Like the petitioner here who suggests that his political association with the Mayor should insulate him from partisan politics, criticism, and public rebuke, the plaintiff in Kaluczky believed his six year tenure should insulate him from such behavior. The Second Circuit, though, rejected this notion in language equally applicable here:

> Kaluczky cannot expect to be the only policymaker in America insulated from criticism, hostility, political retribution and humiliation. Kaluczky's tenure makes some difference: it gives him a platform from which to respond to public rebuke, to challenge the administration's policies and practices, and contest any infringements on his traditional powers and responsibilities either directly to the public, in the press or (possibly) in state court . . . . In any event, the federal Constitution does not set terms of engagement for warring factions of municipal government.

Id. at 209.

In sum, no real or embarrassing conflicts between the First Circuit and the cited circuits exist to warrant review of the decision below.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Arthur Therrien,
International Brotherhood of
Police Officers, and Local 388
of the International Brotherhood
of Police Officers,

By their attorney,

Lawrence D. Humphrey
159 Burgin Parkway
Quincy, Massachusetts 01269
(617) 376-0220

Dated: December 2, 1997

Certificate of Service

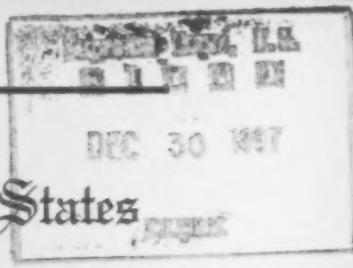
I hereby certify that three copies of the foregoing document was served upon all parties this day by first class mail, postage prepaid, to Stewart T. Graham, Jr., Esq., 39 Burleigh Road, Hampden, MA 02136; and to John H. Fitz-Gibbon, Esq. and Harry Miles, Esq., 77 Pleasant Street, P.O. Box 210, Northampton, MA 01061.

Lawrence D. Humphrey

Lawrence D. Humphrey

Dated: December 2, 1997

No. 97-754



In The

Supreme Court of the United States

October Term, 1997

ROBERT WAGNER and MARGARET WAGNER,

Petitioners,

vs.

PATRICIA DEVINE, KEVIN A. JOURDAIN, CHARLES E. MORAN, III, ARTHUR THERRIEN, JOHN E. WHELIHAN, THE CITY OF HOLYOKE, MASSACHUSETTS, THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS and LOCAL 388 OF THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PATRICIA DEVINE, KEVIN A. JOURDAIN, CHARLES E. MORAN, III, JOHN E. WHELIHAN AND THE CITY OF HOLYOKE

DANIEL M. GLANVILLE
City Solicitor
Law Department
City of Holyoke
Room 204
City Hall Annex
Holyoke, MA 01040
(413) 534-2183

JOHN H. FITZ-GIBBON
Counsel of Record
HARRY L. MILES
GREEN, MILES, LIPTON,
WHITE & FITZ-GIBBON
77 Pleasant Street
P.O. Box 210
Northampton, MA 01061
(413) 586-8218

Attorneys for Respondents Patricia Devine, Kevin A. Jourdain, Charles E. Moran, III, John E. Whelihan and the City of Holyoke

72764

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether a Chief of Police who is a policymaker is protected by the First Amendment from a constructive discharge effected by a minority of the members of a city council, who are motivated by the Chief's political association with the Mayor with whom they had political differences.

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Pursuant to Supreme Court Rule 15, the Respondents, Patricia Devine, Kevin A. Jourdain, Charles E. Moran, III and John E. Whelihan (hereinafter collectively referred to as "Councilors") and the City of Holyoke ("City"), submit this brief in opposition to the petition for writ of certiorari ("Pet.").

DECISIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1 through 11 of Appendix A to the petition, is reported at 122 F.3d 53 (1997). The earlier Memorandum of Decision and Order of the District Court of Massachusetts, Western Division, is not reported, and is included in Appendix B to the Petition at pages 1 through 7.

STATEMENT OF JURISDICTION

The opinion of the First Circuit Court of Appeals was entered on August 1, 1997 (App. A). The petition was filed October 30, 1997, and was received by these Respondents on or about November 3, 1997. On December 3, 1997, these Respondents were granted an extension of time in which to file a response to the Petition for Writ of Certiorari to and including January 5, 1998.

STATEMENT OF THE CASE

The Petitioners, Robert and Margaret Wagner ("Wagner"), filed their action on December 8, 1995 in the United States District Court for the District of Massachusetts, Western Division, pursuant to 42 U.S.C. § 1983, for recovery for alleged wrongful acts relating to Robert Wagner's resignation from employment as Chief of Police. Wagner claimed that his First Amendment freedom of political association[1] was violated when certain members of the City Council

1. While Wagner's complaint and his appellate briefs made passing references to alleged First Amendment violations based upon his political

(Cont'd)

and others subjected him to severe harassment, ultimately forcing him to resign, because of his political support for the Mayor. (App. A at 2). He also asserted ancillary state claims. *Id.* The Respondents filed motions to dismiss prior to answering the complaint (App. A at 2; App. B at 2), and the District Court, following arguments on the motions, dismissed the complaint. (App. B). That decision was upheld by the First Circuit Court of Appeals on August 1, 1997 (App. A).

The Petitioner, Robert Wagner, was appointed to the position of the Chief of Police of the City of Holyoke by the Mayor on July 8, 1991. (App. B 2-3). At that time, the Respondents, Patricia Devine, Kevin Jourdain, Charles Moran, and John Whelihan, were elected members of the Holyoke City Council, and comprised a minority of the fifteen member City Council. (App. A at 3-4, n.4). These Councilors were political adversaries of the Mayor (App. B at 3). Only the Mayor of the City of Holyoke has the authority to appoint or discharge the Chief of Police, although the City Council has the power to set the salary and benefits for the position, including the authority to reduce, or even eliminate, the Chief's salary. (App. A at 4, 10).

The Petitioners assert that the Councilors engaged in a campaign of harassment against him for the purpose of embarrassing the Mayor and forcing the Petitioner to resign. (App. A at 3). The campaign of harassment took the form of constant criticism, the reduction of his salary and benefits, an attempt to eliminate his salary, and a refusal to fund certain programs advocated by the Petitioner. *Id.* He contends that these actions were

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(Cont'd)
speech, as well as his political affiliation, the case was litigated solely on the theory that the Respondents harassed and constructively discharged the Petitioner based on his political beliefs and affiliation, and the Court of Appeals for the First Circuit confined its analysis to that context. (App. A at 3, n.3).

motivated solely by the Councilors' opposition to his political beliefs and his political support of the Mayor. *Id.* As a result of these actions, and the actions of the other Respondents, the Petitioner resigned in September of 1994, claiming that he was forced to do so because the Respondents' actions hindered, undermined and interfered with the performance of his duties, and thus constituted a constructive discharge. *Id.* at 4.

The District Court dismissed the Petitioners' complaint, holding that the "slurs and jibes" and harassments endured by the Petitioner were a natural "byproduct of our long-standing organization of political life into two or more parties," *Agosto-De-Feliciano v. Aponte-Roque*, 889 2d 1209, 1217 (1st Cir. 1989), and that the Chief of Police could reasonably be required to develop "a suitable thick skin" as a natural concomitant to the job. (App. B at 5). The Court concluded that the alleged harassment sustained by the Petitioner did not constitute a "constitutionally significant burden" on the Petitioner's right of political association, and accordingly, concluded that the Petitioners' Section 1983 action would prove unsuccessful, and dismissed that portion of his amended complaint. *Id.* Further, the Court concluded that the Chief of Police, like other "high-ranking policymakers in Holyoke" was not protected by the First Amendment from partisan attacks on his job performance. (App. B at 6-7).

On August 1, 1997, the First Circuit Court of Appeals affirmed the judgment of the District Court. (App. A). The Court concluded that

> [T]he First Amendment protection against patronage practices, as well as the exceptions for certain categories of highly placed employees, apply whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors.

(App. A at 8).

The Court noted that the Petitioner, as Chief of Police, was an admitted high echelon employee or "policymaker"[2] within the city of Holyoke, and therefore fell well within the exceptions to the First Amendments' prohibition against patronage practices as outlined by this Court. *Id.* The Court's conclusion stems from its recognition that an administration's need to carry out its policies is matched by the "equally legitimate right of political opponents to exert pressure on behalf of their viewpoints and constituents" (*Id.* at 9), and that "policymakers" could be expected to face "stinging partisan attacks" by members of the City Council, exerting power within their authority, and that the First Amendment would not provide a shield to such attacks for those, such as the Chief of Police, whose positions are politically sensitive. (*Id.* at 10).

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United Sates provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion . . . granted only for compelling reasons." Certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties. *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498 (1951). For the reasons set forth below, the petition fails to satisfy this criteria, and the petition should therefore be denied.

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2. The First Circuit used the term "policymaker" as a shorthand reference for the several categories of employees for whom partisan affiliation is an appropriate job criterion. (App. A at 7, n.7). That term is used similarly throughout this brief.

I.

THE FIRST CIRCUIT'S HOLDING THAT THE FIRST AMENDMENT DOES NOT PROHIBIT THE CONSTRUCTIVE DISCHARGE OF A POLICYMAKER BY HIS POLITICAL OPPONENTS, PARTICULARLY IN THE CIRCUMSTANCES OF THIS CASE, DOES NOT WARRANT REVIEW.

The crux of the Petitioners' argument is that high-level public employees retain certain First Amendment rights outside the patronage related employment situations and principles articulated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In addition, the Petitioners argue that both the Court of Appeals and District Court opinions in this case misapplied the principles articulated in those cases. In essence, the Petitioners argue that the Supreme Court's patronage trilogy is confined to patronage practices by an employer, and not to adverse treatment by the employer's political adversaries or to politically motivated employment actions. (Petition 9-10, 12-15). While acknowledging that his position as Chief of Police qualifies him as a "high level public employee" (Pet. 7), a "policymaker", he contends that the politically motivated harassment waged against him by his political opponents and those of the Mayor violate his First Amendment protections and are outside the exceptions for such protection outlined in *Elrod*, *Branti*, and *Rutan*.

The Petitioners have construed this Court's holdings in *Elrod*, *Branti*, and *Rutan* too narrowly, however, and the First Circuit's holding in this case correctly applied the principles articulated in those cases.

As a general proposition, the First Amendment provides protection for public employees from adverse job action based

solely upon partisan political affiliation. *Elrod*, at 359. That protection, however, is not without exception. *Id.* at 360. The Court recognized that the competing First Amendment interest of the political party in power "to insure the policies which the electorate has sanctioned are effectively implemented", *Elrod*, at 372, and allowed patronage practices to continue for those employees who, *inter alia*, made policy or occupied positions of confidence. *Id.*; *Branti*, 445 U.S. at 517-18.

In *Branti*, the Court refined the "policymaker/confidential" test articulated in *Elrod* by holding that a state demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, *supra* at 518.

There is nothing inimical in the First Circuit's holding in this case to Supreme Court precedent. There is nothing in *Elrod*, *Branti*, or *Rutan* which would expressly limit the exceptions to the Petitioners' First Amendment protections to activities of the Mayor, the "employer" in this case.

> A government's interest in securing employees who will loyally implement its policies can adequately be served by choosing or dismissing certain high level employees on the basis of their political views. . . . [t]he First Amendment is not a tenure provision, protecting employees from actual or constructive discharge.

Rutan, 497 U.S. 74-76.

The Petitioners' argument ignores the fact that the Councilors are part of the "government" as well, and have an equal and just as compelling interest in exerting pressure on behalf of their viewpoints

and that of their constituents. Like the Mayor, the Councilors have an interest in insuring that their policies and agenda — policies presumably sanctioned by their electorate, *Elrod*, 427 U.S. at 367 — would be given voice and implemented.

As the First Circuit's opinion notes, the conflict in *Rutan* did not arise amidst the seating of the new administration, but involved the implementation of an executive order proclaiming a hiring freeze with "exceptions" allegedly made based upon political affiliation. That decision clearly indicates that the First Amendment protection against patronage practices, as well as the exceptions for high-level employees, apply whenever public employees "are at odds politically with their superiors and thus subject to politically discriminatory behaviors." (App. A at 8).

The First Circuit's decision in *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996), is even more to the point. There, the court found no First Amendment protection for a policymaker whose First Amendment rights of speech and association had been injured by his political opponents. 75 F.3d at 34. (App. A at 8-9).

To accept the Petitioners' argument is to ignore the political realities of modern day life, and its ordinary organization into two or more parties. This Court has recognized its "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964)) and a fundamental understanding that "competition in ideas and governmental policies is at the core of our electoral process. . . ." *Elrod* (citing *Williams v. Rhodes*, 393 U.S. 23, 32 [1968]) at page 357. Viewed against this background, it is clearly appropriate to require that the Petitioner — the chief law enforcement officer in the City of Holyoke — develop "a suitably thick skin to withstand the rigors of our societal, often highly politicized, life." *Agosto De-Feliciano*, at 1217. *See also Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989)

["harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs."] The Petitioner

> cannot expect to be the only policymaker in America insulated from criticism, hostility, political retribution and humiliation. . . . In any event, the federal Constitution does not set terms of engagement for warring factions of municipal government.

Kaluczky v. City of White Plains, 57 F.3d 202, 209 (2nd Cir. 1995).

To hold otherwise would open the "floodgates" of litigation, where the Courts would be "inundated by claims of unhappy politicians that their opponents had transgressed the boundary between constitutional and unconstitutional fair play." (App. A at 11). *See also Pieczynski*, *supra* at page 1332 (noting the "floodgate").

> When the Courts are flooded with litigation under that most unmanageable of standards (*Branti*) brought by that most persistent and tenacious of suitors (the disappointed officer seeker), we may be moved to reconsider our intrusion into this entire field.

Rutan v. Republican Party of Illinois, 497 U.S. 62, at page 115, (Scalia, dissenting).

II.

CERTIORARI IS INAPPROPRIATE AS NO CONFLICT OF OPINION AND AUTHORITY EXISTS BETWEEN THE COURTS OF APPEALS.

The Petitioner claims certiorari is warranted in this case because the First Circuit's opinion conflicts with decisions of the Court of Appeals for the Seventh Circuit and "possibly" those of the Court of Appeals for the Second Circuit. Once again, the Respondent has misconstrued and misapplied the holdings in cases he cites as supporting that proposition. (Pet. 15-18). Certiorari is proper only in cases where there is a "real and embarrassing conflict of opinion and authority between Courts of Appeals." *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498 (195[illegible] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). The purported conflicts here are neither real nor embarrassing.

Cases from the Second Court of Appeals present the clearest example of a *lack* of conflict with the First Circuit. The Petitioners cite *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988) which held that political retaliation not amounting to actual discharge of a public employee is actionable under 42 U.S.C. § 1983. The case was decided prior to this Court's decision in *Rutan*, *supra*, 497 U.S. 62 (1990) which resolved that question in the affirmative, at least with respect to those employees in non-policymaking or confidential positions where party affiliation was not an appropriate requirement for the effective performance of the job. By that time, the First Circuit had likewise recognized the viability of such an action for non-policymaking employees. *Agosto De-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1989).

Since *Rutan*, the Second Circuit has had another occasion to consider the issue in *Kaluczky v. City of White Plains*, 57 F.3d 202 (2nd Cir. 1995). Kaluczky was a Republican personnel officer, an

admitted "policymaking" position. *Id.* at 208. He had been reappointed to his position by a Republican mayor in the last year of the Republican administration. After a Democratic administration took office, Kaluczky alleged that they (the Mayor and members of the White Plains Common Council) engaged in a campaign of retaliation against him, in part, because of his political views and party affiliation. Specifically he alleged that the Defendants took retaliatory measures in order to induce his resignation. These retaliations included, *inter alia*, public humiliation and harassment, isolating him politically, curtailing his professional responsibilities and verbally assaulting him for his political affiliation and support of the previous administration. The Defendants also threatened to freeze his pay and to make him "go through hell" if he refused to resign. Kaluczky, however, did not resign. The Court held that, because the Plaintiff occupied a policymaking position, he had no First Amendment protection from either discharge or adverse employment actions as a result of his political beliefs and party affiliation. *Id.* at 207-209. The Court held that adverse employment actions, including discharge, demotion, refusal to hire, refusal to promote, reprimand and transfer of all Kaluczky's policy-making responsibilities to persons loyal to the Defendants, were "measures . . . fully condoned by the rationale of the *Elrod-Branti* line of cases regarding patronage dismissals." *Id.* at 208.

Thus there is nothing inconsistent between the decisions of the First Circuit or Second Circuit on these issues.

The Petitioner next claims that the First Circuit's decision below is contrary to *Wallace v. Benware*, 67 F.3d 655 (7th Cir. 1995). In that case, a Deputy Sheriff brought an action against the County Sheriff, claiming a First Amendment violation arose when the Sheriff retaliated against him through a campaign of harassment after the Deputy announced that he would run against the Sheriff in an upcoming election. The Seventh Circuit held that a campaign

of retaliatory harassment violated the Deputy's First Amendment rights even though an outright dismissal would not have. *Id.* at 662.

Wallace is distinguishable from the instant case in several respects. First, the campaign of harassment that was the subject of Wallace's Section 1983 claim was prompted solely by his political speech during the campaign, *Id.* at 656-657, and did not involve a First Amendment claim based upon Wallace's political associations, and, accordingly, differing legal considerations may apply. *Cf. Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563 (1968).

Second, the Deputy in *Wallace* retained his job, unlike the Petitioner in the instant case, who claims he was discharged, although constructively. Complicating the picture in *Wallace* was the fact that the Deputy's employment was governed by the terms of a collective bargaining agreement, and the Court appeared most distressed by the fact that the Deputy's job performance was hampered in virtually every respect, while he still maintained his job. The Court conceded, however, that a direct discharge in these circumstances would not violate the First Amendment. *Id.* 663. Those facts are distinguishable from those present in this Petitioner's case.

Finally, the Respondents respectfully submit that there is a marked difference between the duties and responsibilities of a Deputy Sheriff as opposed to a Chief of Police, who encounters political criticism and opposition from members of a City Council, who most assuredly have a right to comment on, criticize and vote on matters of policy affecting the police department. The First Circuit has already recognized that public employer actions short of dismissal, in the nature of harassment, adversely affecting a non-policy employee, based solely upon that employees' political affiliation, violates First Amendment right of association. *Agosta-De-Feliciano, supra. Wallace* presents no conflict with the First Circuit's holding on the facts of the instant case.

In conclusion, no real or embarrassing conflicts exist between the First Circuit and the cited circuits to warrant review of the decision below.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN H. FITZ-GIBBON
Counsel of Record
HARRY L. MILES
GREEN, MILES, LIPTON,
WHITE & FITZ-GIBBON
77 Pleasant Street
P.O. Box 210
Northampton, MA 01061
(413) 586-8218

DANIEL M. GLANVILLE
City Solicitor
Law Department
City of Holyoke
Room 204
City Hall Annex
Holyoke, MA 01040
(413) 534-2183

Attorneys for Respondents
Patricia Devine, Kevin A. Jourdain,
Charles E. Moran, III,
John E. Whelihan and the
City of Holyoke